BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the *Ontario Human Rights Code*, 1981, S.O. 1981, c.53, as amended;

AND IN THE MATTER OF the complaint by Josephine Bridson dated December 28, 1989, alleging discrimination in services on the basis of race, colour, ethnic origin and handicap.

B E T W E E N :

Josephine Bridson

Complainant

- and -

Marathon Public School (Lake Superior Board of Education)

Respondent

INTERIM DECISION

Adjudicator : Dean H.A. Bassford

Date : June 11, 1995

Board File No: 93-0010

Decision No : 95-036-I

Board of Inquiry (*Human Rights Code*)
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IN THE MATTER OF the *HUMAN RIGHTS CODE*, R.S.O. 1990, c.H. 19, as amended;

AND IN THE MATTER OF the complaint dated December 28, 1989, by Josephine Bridson, alleging discrimination in services on the basis of race, colour, ethnic origin and handicap by Marathon Public School (Lake Superior Board of Education)

BEFORE: H. A. Bassford
Board of Inquiry

Appearances: J. Bridson
Complainant

A. D'Silva
K. Daniels
Counsel for the Human Rights Commission

P. Murray
Counsel for the Respondent

INTERIM DECISION

This decision relates to the motion of the Respondent that the Complainant Ms. Josephine Bridson be removed as Complainant, and that her son, Jimmy Bridson, be substituted as Complainant. The original complaint in the matter before this board was brought by Ms. Bridson as next friend of her son Philip James (Jimmy) Bridson, who was then a minor. He has since attained the age of majority, which is the basis for the Complainant's motion. The motion was opposed by Ms. Bridson.

It was undisputed that Mr. Bridson has attained the age of eighteen years, which is the age of majority in the province of Ontario. Further, in proceedings under the *Human Rights Code*, it would be usual for a minor upon attaining the age of majority to be substituted as complainant for the next friend who had served as a complainant on behalf of the minor. While the Commission did not take a position on the motion itself, counsel for the Commission, Mr. D'Silva did confirm that it is generally the Commission's position to want a complainant who has turned the age of majority to become the main complainant, in order to avoid the possibility of more than one complainant in fact in any particular complaint. The question, then, is whether there are grounds in the present case to make an exception to the general rule.

While there were few legal materials presented concerning the present motion, useful guidance can be found in the *Substitute Decisions Act*, which was proclaimed in April of this year. The purpose of the *Act* is to provide for the making of decisions on behalf of adults concerning the management of their property and their personal care. Two things need to be noted with respect to the present motion.

First, the *Act* provides a presumption of capacity. This is seen in section 2:

> 2.--(1) A person who is eighteen years of age or more is presumed to be capable of entering into a contract.
>
> (2) A person who is sixteen years of age or more is presumed to be capable of giving or refusing consent in connection with his or her own personal care.

This confirms the procedure generally followed by the Commission when a complainant has attained the age of majority.

Second, the Act gives grounds for determining incapacity with respect to property or personal care. The relevant sections are 6 and 45.

> 6. A person is incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.
>
> 45. A person is incapable of personal care if the person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not

> able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

In the present case, the analogous test would be whether Mr. Bridson is capable of understanding information that is relevant to making a decision in the management or direction of the current litigation; whether, that is, he is capable of retaining or instructing counsel or an agent with respect to this proceeding.

Ms. Bridson presented two grounds for an exception from the usual rule which would see Mr. Bridson named as Complainant. The first was that Mr. Bridson desires Ms. Bridson to continue as Complainant. This desire was conveyed both by a letter and by a power of attorney executed on his behalf. The second was that Mr. Bridson does not have sufficient written or oral language skills to communicate on an effective level on his own regarding the present case.

With respect, the first ground cannot succeed. Ms. Bridson's submissions made Mr. Bridson's wishes clear, but it is his capacity and not his wishes which are at issue in the present motion. Nor is the power of attorney relevant to the present proceedings. It is, I believe, not binding in Ontario for the purposes here proposed. Moreover, the power of attorney, even if binding, does not indicate that Mr. Bridson cannot act for himself now, which is the matter at issue. It only indicates what he would like to do with regard to the handling of the complaint.

In support of the second ground Ms. Bridson presented as expert evidence written reports of Dr. W.G. Ford, who examined various documents she had provided. These included a speech and language evaluation and a comprehensive psychological evaluation done in 1990, and recent letters of Mr. Bridson. Ms. Murray presented as expert evidence both written and oral testimony of Dr. B. Mandelcorn. Both Dr. Ford and Dr. Mandelcorn are qualified psychologists in the province of Ontario.

Considerable difficulty arose in respect to the expert evidence of Dr. Ford. Ms. Murray objected to admitting his written statements as evidence, because he was not qualified as an expert witness, and because his submissions were neither given under oath nor subject to cross-examination. I admitted his reports under section 15 of the *Statutory Powers Procedure Act*:

> 15.--(1) Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing whether or not given or proven under oath or affirmation or admissible as evidence in a court,
>
> (a) any oral testimony; and
>
> (b) any document or other thing,
>
> relevant to the subject-matter of the proceedings and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

Ms. Murray submitted written argument in support of her position, but I have not found anything to cause me to think the discretion granted under the *Statutory Powers Procedure Act*, section 15 (1) (b) is overridden, or to change my decision with respect to this evidence.

At the same time, I made it clear to Ms. Bridson that Dr. Ford's written evidence is in effect hearsay, and that I would give it much less weight than evidence which is given under oath and is subject to cross-examination. Dr. Ford did appear at the hearing of May 2, 1995. At that time it became clear from a written statement provided to the parties by Dr. Ford, that his evidence was to be based on materials, some of which had not been made available to the Respondent. Because of this, and in response to an objection from Ms. Murray, I did not allow his oral testimony to proceed at that time. Ms. Bridson was given the opportunity to provide the relevant documentation to all parties, after which a date would be scheduled for hearing Dr. Ford's testimony, but she decided not to proceed further with her expert witness. In light of this, I am deciding this motion with only Dr. Ford's written evidence before me. It must be given less weight that the evidence of Dr. Mandelcorn. Accordingly, on points where there is disagreement, and barring additional relevant argument, the opinions of Dr. Mandelcorn will be accepted.

The expert testimony seems to indicate that Mr. Bridson is a person of average intelligence, but with a developmental learning disability . Dr. Ford and Dr. Mandelcorn disagree as to the level and implications of this disability. Dr. Mandelcorn suggests that at the time of testing Mr. Bridson's comprehension of reading material was at a grade 8-9 level, while Dr. Ford interprets the reports as showing Mr. Bridson's application of his reading skills to be below the grade 6 level. Dr. Ford's evidence is that Mr. Bridson's "processing deficits" make a significant impact on his attention to and remembrance of complex, oral language. Dr. Mandelcorn, however, testified that Mr. Bridson is able to comprehend in a normal way material which is presented to him orally.

If there were equal weighting to be given to expert testimony, then a detailed analysis of the testimony given would be in order. However, in this case Dr. Ford's testimony is to be given little weight, so it is appropriate to accept Dr. Mandelcorn's conclusions. The question then is whether a reading comprehension level of grade 8, and a normal comprehension of oral material, is a deficit sufficient to render Mr. Bridson incapable of understanding information relevant to making a decision in the management of the current proceeding.

Dr. Ford presented an argument which might be taken to show that there is such a deficit. He analyzed a memo from the board to the parties which he judged to be written at a grade level of 12 to 13. He noted that Mr. Bridson could not be expected to read and adequately comprehend this memo with a grade 6 reading comprehension level. Now, in fact, the reading comprehension level of grade 8 or 9 which was indicated by Dr. Mandelcorn would also not be sufficient to adequately comprehend the memo. It might thus be concluded that the test for incapacity has been met.

However, as Ms. Murray pointed out in argument, the conclusion here suggested sets the standard too high. It suggests that incapacity will occur whenever a party cannot

part of the material in a case. But often material in human rights cases is legally or technically sufficiently complex that the average layperson will not understand it, and as such will not be able adequately to represent herself or himself independently. The result would be to disqualify the majority of complainants and respondents as incapable. Accordingly, as Ms. Murray argued, the question must be directed to the capacity to understand sufficiently for retaining or instructing counsel.

It has not been argued that a person with a grade 8 reading level would fail to meet this test, and indeed many people with that level of capacity have been able to instruct counsel. Nor has Dr. Ford or Ms. Bridson argued that Mr. Bridson's difficulty with processing oral language make him incapable of instructing counsel. In any case, the normal processing skills concluded by Dr. Mandelcorn would indicate a presumption of capacity. Finally, Dr. Mandelcorn testified, on the basis of documents presented to her, that Mr. Bridson had recently been a defendant in a criminal action , and had apparently been able to instruct counsel in that matter. Based on all of these facts, I conclude that Ms. Bridson has not met the required burden of proof, and that her argument has thus not overcome the presumption of capacity.

I accordingly grant the motion of the Respondent. I order that Ms. Bridson be removed as Complainant in this case, and that Mr. Bridson be substituted. Mr. Bridson will be the Complainant of record in further proceedings in this matter.

Dated at Toronto this 11th day of June, 1995.

H. A. Bassford
Board of Inquiry